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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-5806

ORIGINAL COPY

JOHN NEWMAN, Petitioner

VERSUS

C. MURRAY HENDERSON, Warden
Louisiana State Penitentiary

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SUPPLEMENTAL BRIEF IN SUPPORT OF

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN WILSON REED
Attorney for Petitioner
2735 Tulane Avenue
New Orleans, Louisiana 70119
(504) 822-4488

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Petitioner wishes to direct the Court's attention to the special significance to this case of its opinion in Lefkowitz v Newsome, ___ U.S.___, 16 Cr.L 3063 (February 19, 1975).

In his original petition for certiorari Newman argued in the first instance that the question of "waiver" had no place in his federal habeas proceedings. The argument was based on the fact, now conceded by the State, that in the state habeas proceedings the state courts had chosen to pass upon the merits of petitioner's constitutional claims and had neither enforced nor relied upon the petitioner's purported "waiver" at trial.[1] Relying on Fay v Noia, 371 U.S. 391 (1963), this Court in Newsome, supra, has confirmed the correctness of petitioner's position:

> " . . . if the state courts have entertained the federal constitutional claims in a subsequent proceeding, notwithstanding the deliberate bypass, the federal courts have no discretion to deny the applicant habeas relief to which is otherwise entitled." 16 Cr.L. at 3066, n.9 (emphasis supplied)

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1 Response of State of Louisiana, pp. 2-5.

It is obvious that if plenary state habeas consideration of a federal issue vitiates the effect of a deliberate bypass of trial procedures, the result can be no different where there is alleged merely an implied "waiver" of those trial procedures.

Alternatively petitioner has argued that if the question of "waiver" was nevertheless a proper one for the federal habeas court, then the effectiveness of that "waiver" as a bar to federal relief must be measured by the standards of Fay v Noia, supra, not by those of Davis v United States, 411 U.S. 233 (1973). Again Newsome, supra, confirms this argument. There this Court repeatedly refers to and relies upon the deliberate bypass standard of Fay v Noia as the test by which the availability of federal habeas relief is to be measured. 16 Cr.L. at 3065-66.[2]

At the heart of this case is a dispute over the present status of Fay v Noia. Both the Fifth Circuit and the state have chosen to read Davis v United States, supra, as impliedly overruling or limiting Fay v Noia. Newsome, supra, however confirms in all respects the continuing vitality of the principles originally enunciated in Fay v Noia. It is appropriate therefore for this court to grant the petition for certiorari here both to correct the erosion of Fay v Noia in the Fifth Circuit and otherwise to clarify the confusion created in both the Fourth and Fifth Circuits by the decision in Davis v United States, supra.

Respectfully submitted,

JOHN WILSON REED
Attorney for Petitioner
2735 Tulane Avenue
New Orleans, Louisiana 70119
(504) 822-4488

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2 In this regard the majority is joined by the three Justices subscribing to the dissent of Mr. Justice White. 16 Cr.L. 3066, at 3067.